Supreme Court, U.S.
FILED
95-334 AUG 28 1995
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

VILLAGE OF NEW LEBANON, et al.,
Petitioners,

v.

CYNTHIA BUNCH, ETC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EDWARD R. GOLDMAN #0003530
WILSON G. WEISENFELDER #0030179
900 CENTRAL TRUST TOWER
CINCINNATI, OHIO 45202
(513) 381-9200

COUNSEL FOR PETITIONERS

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO (800) 890-5001

37 pp

I

QUESTION PRESENTED FOR REVIEW

This case presents a significant question not yet decided by this Court in this factual context, and is also the subject of a conflict between the decision of the Sixth Circuit Court of Appeals in this case and the decision of the Fifth Circuit Court of Appeals in Fraire v. City of Arlington, 957 F.2d 1268 (5th Cir.1992) and the decision of the Eighth Circuit Court of Appeals in Krueger v. Fuhr, 991 F.2d 435 (8th Cir. 1993), i.e.:

Whether a Police Officer Is, As a Matter of Law, Entitled to the Defense of Qualified Immunity When, Being Reasonably in Fear for his Life and That of a Fellow Officer, He Employs Deadly Force in Subduing His Assailant.

LIST OF PARTIES

Petitioners are:

Village of New Lebanon
Paul E. Shock, Mayor

Village of New Lebanon, Ohio

Craig A. Kenley, Council Member,
Village of New Lebanon

Lou Cooper, Council Member,
Village of New Lebanon

Kenneth R. Baker, Council Member,
Village of New Lebanon

Gary F. Cornett, Council Member,
Village of New Lebanon

Robert L. Crooks, Council Member,
Village of New Lebanon

Wilbur L. Schreiber, Council
Member, Village of New Lebanon

Pete Vecchi, Council Member,
Village of New Lebanon

Ronald L. Carbaugh, Individually
and as Chief of the New Lebanon
Police Department

Rodney Ables, Individually and
as New Lebanon Police Officer

III

Respondent is: Cynthia Bunch, individually
and as Administratrix of the
Estate of Aaron Matthew Bravard

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW I

TABLE OF AUTHORITIES VI

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTE 1

STATEMENT OF THE CASE 1

ARGUMENT 5

CONCLUSION 9

APPENDIX

Opinion of the United States Court of Appeals For The Sixth Circuit (Appendix A) 1a

Decision of the District Court for the Southern District of Ohio, Western Division (Appendix B) 7a

United States Code, Title 42, § 1983 (Appendix C) 16a

United States Constitution, Amendment IV (Appendix) 17a

United States Constitution, Amendment XIV (Appendix E) 18a

TABLE OF AUTHORITIES

CASES Page

Anderson v. Creighton
483 U.S. 635, 97 L.Ed. 2d 523,
107 S.Ct. 3034 (1987) 6

Anderson v. Liberty Lobby, Inc.
477 U.S. 242, 91 L.Ed.2d 202,
106 S.Ct. 2505 (1986) 5, 19

Fraire v. City of Arlington
957 F.2d 1268 (5th Cir. 1992) 6, 7

Graham v. Connor
490 U.S. 386, 104 L.Ed.2d 443,
109 S.Ct. 1865 (1989) 6, 7

Krueger v. Fuhr
991 F.2d 435 (8th Cir. 1993) 7, 8

Mitchell v. Forsyth
472 U.S. 511, 86 L.Ed. 2d 411,
105 S.Ct. 2806 (1985) 9

Tennessee v. Garner
471 U.S. 1, 85 L.Ed.2d 1,
105 S.Ct. 1694 (1985) 8

STATUTES

28 U.S.C.A. 1254(1) 1

28 U.S.C.A. 1291 2

28 U.S.C.A. 1333 2

42 U.S.C.A. 1983 ..... 1, 2

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

VILLAGE OF NEW LEBANON, et al.,
Petitioner

v.

CYNTHIA BUNCH, ETC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINIONS BELOW

Neither the Opinion of the United States Court of Appeals for the Sixth Circuit nor the Decision of the Federal District Court for the Southern District of Ohio are published.

JURISDICTION

The judgment, of which review is now sought, was entered by the United States Court of Appeals for the 6th Circuit on May 31, 1995.

No rehearing or extension was sought.

This Court's jurisdiction in this proceeding is pursuant to 28 U.S.C.A. 1254(1)

CONSTITUTIONAL PROVISIONS AND STATUTE

Respondent's cause of action was pled under 42 U.S.C.A. 1983 alleging violation of the Fourth and Fourteenth Amendments to the Constitution. (Texts of these provisions and statutes are included in the Appendix hereto.)

STATEMENT OF THE CASE

A. Procedural Posture

The action was commenced in the District Court for the Southern District of Ohio by Cynthia Bunch, individually and as Administratrix of the Estate of Aaron Matthew Bravard, deceased, ("Bravard") against the Village of New Lebanon, Ohio and its Mayor, Council

Members, Police Chief and Officer Rodney Ables (Ables). The action was pled under 42 U.S.C.A. 1983 and alleged that Bravard's civil rights under the Fourth and Fourteenth Amendments to the Constitution had been violated through the use of excessive force, resulting in Bravard's death. Jurisdiction was vested in the District Court by virtue of 28 U.S.C.A. 1333.

A Motion for Summary Judgment was filed on behalf of the Defendants together with supporting affidavits. On September 26, 1994 the District Court entered an Order overruling that motion with prejudice on the issue of qualified immunity; sustaining the motion on the issue of illegal entry into the premises; and overruling it without prejudice as to all other issues.

Defendants timely filed their Notice of Appeal in the U.S. Court of Appeals for the Sixth Circuit on October 17, 1994, and Plaintiff filed a Notice of Cross-Appeal on October 27, 1994. Appellate jurisdiction was pursuant to 28 U.S.C.A. 1291.

By Per Curiam Opinion of May 31, 1995 the Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court.

B. Statement of Facts

On January 15, 1990 Rodney Ables entered service as a full time police officer for the Village of New Lebanon, Ohio, having graduated from the Ohio Police Officer's Training Academy at Montgomery County, Ohio Joint Vocational School and having received a Bachelor of Science degree in criminal justice from the University of Dayton in Dayton, Ohio.

On November 1, 1991 the New Lebanon Police Department adopted a written policy governing the use of deadly force. That policy permitted an officer to use deadly force under the following circumstances:

> In self-defense, when the officer by careful and proper use of his faculties and in good faith believes, and has reasonable cause to believe, that he is in imminent danger of death or great bodily harm and his only means of escape from danger is to take the life of his attacker. It is important that the attacker has all the following elements: (a.) ability or apparent ability; (b.) opportunity; and (c.) jeopardy.
>
> In defense of another person, when the person being defended would be justified in using deadly force to defend himself.

Ables was instructed as to the deadly force policy at the New Lebanon Police Department and had received similar training in his studies.

While on duty on January 28, 1992, Ables was instructed by the police dispatcher to respond to a report of domestic violence at 712 Homeway, New Lebanon. It was reported that a male individual was threatening his mother with a knife at that address.

Upon his arrival at the indicated location, Chief Carbaugh and Sergeant Lunsford of New Lebanon as well as Patrolman LeRoy Murphy of the Jackson Township Police Department were already there. Chief Carbaugh was talking to a woman in the front yard of 712 Homeway. Ables heard the woman, whom he later

learned to be the mother, Mrs. Bunch, say that her son (Bravard) had threatened both to kill her and to cut his own wrists.

Ables then entered the garage of the residence where he joined Lunsford and Murphy preparing to search the house. It was about at this time that Ables drew and placed on ready his weapon, a Glock 9-mm semi-automatic handgun. Ables and Lunsford began their search and they were joined by Murphy while checking closets in a hallway.

Ables stepped into the doorway of a small "L"-shaped bathroom from which position he could see a combination bathtub/shower on the right but could not see around the corner into the rest of the bathroom. He stepped back out of the bathroom when he received a call on his portable radio from the dispatcher inquiring as to whether the officers were all right. He responded affirmatively.

Reentering the bathroom, as he approached the shower, he detected a movement on his right and felt a stinging sensation on his right hand which he later learned was a knife cut. He heard a loud yell from the shower and Bravard leaped out holding a knife in front of him. Bravard started to stumble but quickly regained his balance and, as Ables attempted to back away, Bravard advanced upon him with the knife above his head in a threatening position. As Bravard was bringing the knife downward toward Ables, the officer was unable to back away fast enough. He fired a single shot when Bravard was two to two and one-half feet from him and struck Bravard in the left chest. Still holding the knife, Bravard fell to the floor and was disarmed and handcuffed by Patrolman Murphy.

From the time Ables detected movement in the shower until he fired his weapon, two to three seconds elapsed. When he fired his weapon, Ables was in fear for his life and concerned for the safety of Patrolman Murphy.

ARGUMENT

Both the District Court's denial of summary judgment, and the affirmance of that decision by the Court of Appeals, were on the stated basis that genuine issues of material fact were presented by the affidavit of a pathologist to the effect that, based on the path of the bullet's entrance into Bravard's body, Bravard could not have been directly facing Officer Ables at the time the shot was fired.

The position of Petitioners is twofold. First, the difference between the pathologist's opinion and the testimony of Ables is such a minor discrepancy as not to constitute a genuine issue of material fact. Second, it does not go to the central issue of the objective reasonableness of Ables's belief that his and a fellow officer's life were threatened.

The impropriety of denying a motion for summary judgment on the basis of such a minor discrepancy was pointed out by this Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986):

> ... the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. (at 477 U.S. 247-248, emphasis in

original).

That principle was given application by the Court of Appeals for the Fifth Circuit in a case much like the present one. The following observation in Fraire v. City of Arlington, 957 F.2d 1268 (5th Cir. 1992) could and should have been applied to the case at bar:

> Almost all excessive force cases are very fact intensive; this one is certainly no exception. And, although there are differing versions of some of the facts in this case, the discrepancies do not rise to the level of genuine issues of material fact. (at 1269-1270)

The test which has long been applied by this Court is whether the action of the police officer is "objectively reasonable" in light of the facts and circumstances confronting him. Graham v. Connor, 490 U.S. 386, 104 L.Ed 2d 443, 109 S.Ct. 1865 (1989). In applying the "objectively reasonable" standard in Anderson v. Creighton, 483 U.S. 635, 97 L.Ed 2d 523, 107 S. Ct. 3034 (1987), Justice Scalia, speaking for the majority of the Court, stated:

> We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials–like other officials who act in ways they reasonably believe to be lawful–should not be held personally liable. (at 641)

Bearing in mind that Officer Ables was suddenly

confronted with a knife wielding individual who had threatened his mother and his own life with the use of that knife, the following sentence from Chief Justice Renquist's opinion in Graham v. Connor, supra, is quite appropriate:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. (at 396)

and

> The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation. (at 396-397)

In ruling that a divergence between Officer Ables's testimony and that of a pathologist presented a genuine issue of material fact, the opinion of the Court of Appeals in this case is in conflict with that of the Court of Appeals for the Fifth Circuit in Fraire, supra.

Additionally, the appellate decision in this case is in conflict with that of the Court of Appeals for the Eighth Circuit in Krueger v. Fuhr, 991 F.2d 435 (8th Cir. 1993) which granted qualified immunity to an officer who shot a fleeing suspect in the back in the belief that the suspect would turn and attack him.

In its opinion in the present case, the Court of

Appeals attempted to distinguish Krueger on two basis - (1) that, unlike the present case, Krueger involved a fleeing suspect, and (2)that the testimony of the officer in Krueger was undisputed. As to the first, any distinction between a fleeing suspect and an assailant is less than meaningless. Certainly, the use of necessary force in defending one's self and others from an assailant is more significant than preventing a suspect's escape. Further, the Court of Appeals ignored the fact that Fuhr, like Ables, believed he was threatened. As to the attempt of the Court of Appeals to distinguish Krueger because the officer's account of the occurrence was undisputed, the Court of Appeals commits the same error that places its decision in conflict with Fraire. It permits differing versions of an occurrence to rise to the level of genuine issues of material fact.

In a dissenting opinion in Tennessee v. Garner, 471 U.S. 1, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985), Justice O'Connor made the following observation:

> Nonetheless, the reasonableness of Officer Hymon's conduct for purposes of the Fourth Amendment cannot be evaluated by what later appears to have been a preferable course of police action. (471 U.S. at 29)

Likewise, the reasonableness of Officer Ables's conduct for purposes of the Fourth Amendment cannot be evaluated on the basis of what a pathologist opined to be the position of the officer's assailant.

The desirability of early resolution of a public official's entitlement to qualified immunity has been well

recognized by this Court. (Mitchell v. Forsyth, 472 U.S. 511, 86 L.Ed. 2d 411, 105 S.Ct. 2806 (1985) and Anderson v. Creighton, supra). That objective was subverted by the courts below in this case. For that reason and because of the conflict thus created with decisions of two other circuits, we ask that this Court grant certiorari.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

By: /s/Edward R. Goldman
EDWARD R. GOLDMAN
#0003530
Wilson G. Weisenfelder
#0030179
900 Central Trust Tower
Five West Fourth Street
Cincinnati, Ohio 45202
513/381-9200

OF COUNSEL:

RENDIGS, FRY, KIELY & DENNIS

Attorneys for Petitioners

APPENDIX A

CYNTHIA BUNCH, Individually and as Administratrix of the Estate of Aaron Matthew Bravard,	)	
Plaintiff-Appellee Cross-Appellant	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO
v.	)	
VILLAGE OF NEW LEBANON, et al.	)	
Defendants-Appellants Cross-Appellees.	)	

BEFORE: SUHRHEINRICH and DAUGHTREY, Circuit Judges: HEYBURN, District Judge.*

PER CURIAM. Plaintiff Cynthia Bunch brought this civil rights action under 42 U.S.C. § 1983 against defendant Rodney Ables, a police officer employed by defendant Village of New Lebanon, the mayor and council members of the village and the Chief of the New

* The Honorable John G. Heyburn II, United States District Judge for the Western District of Kentucky, sitting by designation.

Lebanon Police Department. Bunch alleges that Ables used excessive force when he shot and killed her son, Aaron Bravard. Defendants appeal the district court's order denying their motion for summary judgment on the basis of a qualified immunity.[1] Because the order is appealable immediately as a final judgment under the collateral order doctrine, Walton v. City of Southfield, 995 F.2d 1331, 1336 (6th Cir. 1993), and because we find that the applicability of qualified immunity involves a question of fact, we **AFFIRM**.

I. FACTS

Bunch called the Montgomery County Sheriff's Office on January 28, 1992, to report a domestic dispute between her and her son. A police dispatcher subsequently informed Ables that a male individual was threatening his mother with a knife. The dispatcher instructed Ables to respond. When Ables arrived, chief Carbaugh and Sergeant Lunsford of the New Lebanon Police Department and Patrolman Murphy of the Jackson Township Police Department had already arrived. According to Ables, he heard Bunch say that her son had threatened to kill her and to cut his wrists.

---

[1] Plaintiff cross appeals the district court's holding that, as a matter of law, exigent circumstances existed to justify Ables' warrantless entry into plaintiff's house. Because this appeal is taken from a nonfinal order and is neither an appealable interlocutory order nor certified under Fed. R. Civ. P. 54(b), it is beyond our jurisdiction and is dismissed. Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 744-45 (1976).

Thereafter, Ables entered the garage of the residence where he joined Lunsford and Murphy. Ables had drawn his weapon, then the three entered and searched the house.

Ables stated that he entered an L-shaped bathroom, and as he approached the shower, he detected movement to his right. According to Ables, as he heard a loud yell from the shower, Bravard leaped from the shower. Ables further stated that as he backed away, Bravard advanced with a knife held overheard in a threatening position. Ables claimed that as Bravard brought the knife downward toward Ables, Ables fired a single shot. Bravard was approximately two feet away when Ables shot him. The bullet struck Bravard in the left chest. Ables stated that these events happened in about three seconds and that he was in fear for his life and concerned for the safety of the other officers.

II. ANALYSIS

The Fourth Amendment protects citizens from unreasonable search and seizure. Officer Ables' actions constituted a seizure within the meaning of the Fourth Amendment. Tennessee v. Garner, 471 U.S. 1, 7 (1985). To decide the issue before the court, we must determine de novo whether Ables' use of deadly force against Bravard was reasonable within the meaning of the Fourth Amendment. Yates v. City of Cleveland, 941 F.2d 444, 446 (6th Cir. 1991). The use of deadly force is limited to situations in which the "officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." Garner, 471

U.S. at 11. An officer using deadly force is entitled to qualified immunity if "a reasonable officer could have believed [the seizure] to be lawful, in light of clearly established law and the information the [seizing] officer possessed." Hunter v. Bryant, 502 U.S. 224 (1991).

The district court denied defendants' motion for summary judgment based on qualified immunity, concluding that when there are "factual disputes surrounding a shooting such that the reasonableness of the shooting cannot be determined without determining which of competing versions of the facts are true, the reasonableness of the shooting and the applicability of the qualified immunity become questions for the jury." (District Court Opinion, p.3)(citations omitted).

Ables' version of the facts, if unrefuted, entitles him to immunity; however, plaintiff has produced evidence that conflicts with Ables' rendition. First, plaintiff submitted the affidavit of an expert medical pathologist. The medical expert, Dr. Donald Schaffer, after reviewing the evidence, including the deposition testimony of Ables and lab reports, stated, "It is physically impossible for the gunshot wound to Bravard to have occurred at a time when Bravard was directly facing Ables as described in Ables' testimony." Schaffer instead believes that the evidence indicates that Ables shot Bravard as Bravard exited the shower. Given the physical layout of the bathroom and the shower enclosure, Bravard was facing the east wall of the bathroom and in no position to pose a threat to Ables.

Plaintiff also provided a diagram of the bathroom,

indicating that the shower entrance is 14 inches wide when the bathroom door is open, and that one must step over a 14 and 3/4 inch tub enclosure to exit the shower. Bravard, at 5'10" and 190 pounds was too large to leap in the manner described by Ables. Plaintiff contends that to exit the shower enclosure in the manner described by Ables, it would be necessary to push the bathroom door closed to widen the 14 inch opening; yet, Ables testified that he was standing in front of the open bathroom door when he was attacked by Bravard.

Ables argues that the bullet angle does not create a genuine issue of material fact because it is immaterial as to whether Ables was reasonably justified in acting to protect himself. To support this contention, defendants city Krueger v. Fuhr, 991 F.2d 435, 437 (8th Cir.), cert. Denied, 114 S. Ct. 386 (1993)(reversing a denial of summary judgment on the basis of qualified immunity even though the defendant officer had shot a fleeing suspect in the back because the officer believed that the suspect would turn and attack him with a knife). Although Krueger seemingly supports Ables' action given his confinement in a small bathroom and his proximity to Bravard, Krueger is distinguishable. First, the Krueger decision authorized deadly force as it was "necessary to prevent [the] escape" of a fleeing felon. Id. at 440. Second, the officer's version of events in Krueger was uncontested.

Our case is analogous to Samples v. City of Atlanta, 846 F.2d 1328 (11th Cir. 1988), a case distinguished by the Krueger court. In Samples, the seizing officer stated the victim was advancing toward the

officer with a knife when the officer shot him, yet the physical evidence showed that the victim was shot in the back. As occurred in Samples, here there is physical evidence calling into question the accuracy of the officer's explanation of what transpired. Schaffer has stated that the physical evidence is consistent with a version of events that would draw into question the reasonableness of Ables' conclusion that Bravard posed such a threat that shooting him was reasonable

Accordingly, we **AFFIRM** the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CYNTHIA BUNCH, etc., Plaintiff,	)	CASE NO. C-3-93-39
v.	)	JUDGE WALTER HERBERT RICE
VILLAGE OF NEW LEBANON, et al., Defendants.	)	**DECISION AND ENTRY**

DECISION AND ENTRY OVERRULING IN PART AND SUSTAINING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOC. #11); DEFENDANTS' OBJECTIONS TO EVIDENTIARY MATERIALS SUBMITTED BY PLAINTIFF (DOC #32) CONSTRUED AS MOTION TO STRIKE AND OVERRULED AS MOOT; REQUEST OF DEFENDANTS FOR ORAL ARGUMENT ON THEIR MOTION FOR SUMMARY JUDGMENT (DOC #12) RECONSIDERED AND OVERRULED; NOTATION ORDER OF NOVEMBER 22, 1993, VACATED; CONFERENCE CALL SET

This case arises from the death of sixteen year old

Aaron Bravard, who was the son of the Plaintiff, Cynthia Bunch. Aaron was shot to death by Defendant Rodney Ables, a police officer employed by the Defendant Village of New Lebanon. The Mayor and Council Members of the Village of New Lebanon are also Defendants, as is Ronald L. Carbaugh, who is sued both individually and officially in his capacity as the Chief of the New Lebanon Police Department. The Plaintiff claims that the shooting was a violation of the constitutional rights of the decedent, and that responsibility for said constitutional violation was attributable not only to Officer Ables, but to the Chief of Police and to the municipality, as well. The Plaintiff also appends state law claims for wrongful death, personal injury, and the infliction of serious emotional distress.

This matter is currently before the Court on the Defendants' motion for summary judgment. Doc. #11. As the Defendants seek qualified immunity from suit on the Plaintiff's federal claim, the Court previously ruled that discovery would initially be limited to the question of whether there is a genuine issue of material fact as to whether qualified immunity should be granted with regard to the shooting. Doc. #18.

Qualified immunity is to be granted when a reasonable official in the defendant's place could reasonably have believed that his or her actions were lawful, in light of clearly established law, given the information available to the defendant at the time of the action. Anderson v. Creighton, 483 U.S. 635, 638 (1987). It is, and was at the time of the events in question, clearly established that a person has a right not to be shot by police officers unless that person is perceived to pose a threat to the officers or to others. Yates v. City of Cleveland, 941 F.2d 444, 447 (6th Cir. 1991) (citing

Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988) (citing, in turn, Garner v. Memphis Police Dep't., 710 F.2d 240, 246 (6th Cir. 1983) aff'd and rem'd sub nom. Tennessee v. Garner, 471 U.S. 1 (1985))). Where there are factual disputes surrounding a shooting such that the reasonableness of the shooting cannot be determined without determining which of competing versions of the facts is true, the reasonableness of the shooting and the applicability of qualified immunity becomes questions for the jury. Brandenberg v. Cureton, 882 F.2d 211, 215-216 (6th Cir. 1989); Yates, 941 F.2d at 447.

The Defendants have offered, through deposition testimony, a version of events that would support a grant of qualified immunity. Essentially, the Defendants state that Aaron Bravard was attacking Officer Ables with a knife when Ables shot him. Aaron was shot in the bathroom of his home. The Defendants assert that Aaron leapt from a hiding place in the shower and, after doing so, turned to attack Officer Ables. The Plaintiff, however, has produced an affidavit of an expert medical pathologist and former Deputy Coroner that, based upon his review of the evidence, including the deposition testimony offered by the Defendants and the forensic and crime laboratory reports, he is of the opinion that "it is physically impossible for the gunshot wound to Bravard to have occurred at a time when Bravard was directly facing Ables as described in Ables' testimony [.]" Affidavit of Donald Schaffer, M.D. (attached to Doc. #29). Instead, Dr. Schaffer swears that, to a reasonable medical certainty, "the nature of the gunshot wound inflicted on Mr. Bravard by Officer Ables is entirely consistent with Mr. Bravard having been shot while Mr. Bravard was in position facing the eastern bathroom wall such as that described by Officer Ables as the position Mr. Bravard was in as he exited the shower." Id. The Plaintiff has

thus produced evidence that it is possible that Aaron Bravard was not facing Officer Ables when he was shot.[1] Reading the evidence in the light most favorable to the Plaintiff, who is the non-moving party, it appears that a reasonable trier of fact could conclude from this evidence that Officer Ables could not reasonably have felt threatened by Aaron at the time he fired his weapon.

The Defendants argue that the Plaintiff has seized upon " 'minor inconsistencies' " between the Officer's account of the events and the physical evidence, which minor inconsistencies do not create a genuine issue of material fact. Doc. #33 at 6 (citing and quoting from Pirsein v. Village of Berrien Springs, 980 F.2d 731 (6th Cir. 1992) (unpublished, attached as Exhibit "B" to Doc. #11)). This is not a case of minor inconsistencies. In Piersein, the medical examiner had found the wounds to have been consistent with the officer's account of the events. In this case, a former Deputy Coroner has stated that it is physically impossible for events to have occurred as Officer Ables has described them. Furthermore, he has stated that the physical evidence is consistent with a version of events that would draw into question the reasonableness of Officer Ables' conclusion that Aaron Bravard posed such a threat that shooting him was a lawful course of action. Accordingly, there are genuine issues of material fact as to the events surrounding the shooting, and whether Officer Ables could reasonably

---

[1]The testimony of another medical pathologist, Dr. Lee Lehman, relied upon by the Plaintiff, might be described as equivocal. Nevertheless, even if Dr. Lehman's testimony directly contradicted the affidavit of Dr. Schaffer, such evidence would not remove the genuine issue of material fact created by Dr. Schaffer's affidavit, since, on a motion for summary judgment, the Court is not to weigh the credibility of affiants and deponents.

have believed that he was justified in using deadly force.[2]

The Defendants have filed objections to some of the evidentiary materials submitted by the Plaintiff (Doc. #32), which objections this Court will construe as a motion to strike said materials. As this Court, in making its findings on the issue of qualified immunity, has considered neither the "deposition summary" nor the opinions expressed by Ms. Bunch in her affidavit, the motion to strike is moot insofar as it seeks to strike those materials. As the Plaintiff has now filed certified copies of the post mortem examination report and the two letters from the Miami Valley Regional Crime Laboratory (Doc. #34), the motion to strike is moot insofar as it seeks to strike those materials. The motion to strike (Doc. #32) is, therefore, overruled in its entirety as moot.

The Plaintiff has also argued that the police

---

[2] This finding is made in the context of the qualified immunity issue to which this Court limited its consideration of the Defendants' motion for summary judgment, in its Order of December 14, 1993 (Doc. #18). This limitation was ordered, with the agreement of counsel, even though the Defendants had addressed the contention that there did not exist a genuine issue of material fact on the commission of a constitutional tort (as well as other contentions) in the memorandum accompanying their motion for summary judgment. It appears to the Court that the finding of genuine issues of material fact surrounding the justifiability of the shooting for qualified immunity purposes would logically, if not necessarily, lead to a determination that there are genuine issues of material fact as to whether the shooting amounted to a constitutional tort. However, the Court having limited its consideration at this point solely to the qualified immunity question and the issues necessary to decide that question (including the lawfulness of the officers' presence in the Bunch/Bravard home), no ruling is made as to whether there is a genuine issue of material fact as to the commission of a constitutional tort. See Doc. #18.

officers entered her house illegally on the afternoon that Aaron was shot. If there were a genuine issue of material fact as to whether the officers had violated clearly established law in entering the premises, and thus unreasonably placed themselves in the situation that led to the shooting, qualified immunity would be inappropriate. See Yates, 941 F.2d at 446-448. Thus, it is necessary to rule on the question of the lawfulness of the officers' presence in the home. The uncontradicted evidence before the Court is that Plaintiff herself had called the police, had informed them that Aaron had a knife, and had informed them that he had threatened her life and his own. Given these facts, exigent circumstances justified the officers' warrantless entry into the Bunch/Bravard home.[3] Russo v. City of Cincinnati, 953

---

[3] The Plaintiff has stated that "Ables is not aware of any legally recognized exigent conditions which would allow him to enter Bunch residence without either consent or warrant [,]" particularly in light of the fact that Ms. Bunch was outside the house and in no apparent danger at the time the officers entered. Doc. #29 at 5-6. This assertion is not a direct quotation of Defendant Ables, but appears to hinge on the fact that Ables had not personally been informed that Aaron was a threat to himself. Id. (citing portions of the Deposition of Rodney Ables). Defendant Ables, was, however, personally informed by the dispatcher that Aaron had threatened his mother with a knife. Deposition of Rodney Ables at 9. Furthermore, Ables followed two other officers into the home. The Plaintiff offers no evidence to dispute the testimony of those officers that she (the Plaintiff) had made them personally aware that Aaron was a threat to himself. Deposition of Leroy E. Murphy, Jr., at 28-31; Deposition of David J. Lunsford at 20-21; Deposition of Ronald J. Carbaugh at 120-122 (all stating that Plaintiff had drawn her hand across her wrist, indicating that Aaron had threatened to cut his own wrists). Officer Ables, arriving on the scene after the other officers, could reasonably have thought his action of entering the house to be lawful in light of the information available to him at the time; it was not unreasonable of him to assume that the other officers were entering the home

F.2d 1036, 1043-1044 (6th Cir. 1992). Although, as discussed above, qualified immunity is denied on the basis of the genuine issues of material fact surrounding the circumstances of the shooting, the Court does explicitly state that the presence of the officers in the home was reasonable as a matter of law, and is not in any way a basis for the denial of qualified immunity in this case.

Defendants sought summary judgment on grounds aside from qualified immunity. This Court, however, limited discovery and its consideration of the Defendants' motion to the threshold question of qualified immunity. Doc. #18. Accordingly, the remainder of the grounds for summary judgment asserted by the Defendants (including and especially the claims that there is no evidence of a failure to train that would expose the Defendant Village to liability and that there is no genuine issue of material fact that would allow a finding that Ables committed a constitutional tort), not having been fully briefed and argued by the parties, are overruled without prejudice to their renewal following the conclusion of discovery.

Given Dr. Schaffer's affidavit, which creates genuine issues of material fact as to the circumstances surrounding the shooting, the Court has, upon reflection, determined that oral argument on this issue is unnecessary. The genuine issues of material fact created by Dr. Schaffer's affidavit are not susceptible to being

---

lawfully, given the information that was available to him at the time concerning the prior report of threatened deadly violence. As it turned out, his assumption (regarding the lawfulness of the entry) was not only reasonable, it was correct.

resolved by oral argument on legal issues. Accordingly, the Court, upon reconsideration, will vacate its Notation Order of November 22, 1993, which Order sustained the Defendants' request for oral argument on their motion for summary judgment (Doc. #12). The request for oral argument (Doc. #12) is overruled, as such oral argument is unnecessary.

Wherefore, based upon the aforesaid, the Defendants' motion for summary judgment (Doc. #11) is overruled in part and sustained in part. Said motion is sustained to the extent that it seeks a determination that, as a matter of law, the Defendant police officers' entry into the Bunch/Bravard home was lawful. Said motion is overruled, with prejudice, to the extent that it seeks qualified immunity for the individual officers. The remainder of said motion is overruled without prejudice.

The Defendants' Objections to Evidentiary Materials Submitted By Plaintiff (Doc. #32), construed as a motion to strike said materials, is overruled as moot.

The Request of Defendants for Oral Argument on Their Motion for Summary Judgment (Doc. #12) is, upon reconsideration, overruled. This Court's Notation Order of November 22, 1993, sustaining said request, is vacated.

A telephone conference will be had, between Court and counsel, on Wednesday, October 12, 1994, at 8:45 AM, for the purposes of determining whether the Defendants wish to file an immediate appeal of the qualified immunity ruling to the Sixth Circuit Court of Appeals. Should the Defendants indicate that they have no desire to take such an appeal, a discovery and briefing schedule will be set on the remainder of the summary judgment claims that the Defendants wish to advance.

See Doc. #18. Finally, a trial date and other dates leading to the resolution of this litigation will be established.

September 26, 1994

/s/ Walter Herbert Rice
United States District Judge

Copies to:

Edward R. Goldman, Esq.
Wilson G. Weisenfelder, Jr., Esq.
Frederick E. Davis, Jr., Esq.
Daniel J. O'Brien, Esq.

APPENDIX C

UNITED STATES CODE, TITLE 42

§ 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX D

UNITED STATES CONSTITUTION

AMENDMENT IV - SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX E

UNITED STATES CONSTITUTION

AMENDMENT XIV - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.